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January 26, 1998

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of Section 309(j) of the Communications Act --
Competitive Bidding for Commercial Broadcast and Instructional
Television Fixed Service Licenses (MM Docket No. 97-234)

Dear Ms. Salas:

Transmitted herewith for filing with the Commission on behalf of the School District of Palm Beach County, Florida is an original and four copies of Comments to the above-captioned Notice of Proposed Rulemaking.

An additional "File Copy" of the Comments for our records has also been included. Please date-stamp this "File Copy" and return it to our messenger.

Should there be any questions regarding this matter, please communicate with this office.

Sincerely,



Bradley S. Albert

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Implementation of Section 309(j) of)
the Communications Act -- Competitive)
Bidding for Commercial Broadcast and)
Instructional Television Fixed Service)
Licenses)
_____)

MM Docket No. 97-234

COMMENTS

Pursuant to Section 1.415 of the Commission's Rules, the School District of Palm Beach County, Florida ("Palm Beach"), by its undersigned attorneys, hereby files these comments in response to the Notice of Proposed Rulemaking, FCC 97-397 (released November 26, 1997) in the above-referenced docket. Palm Beach is licensed to operate on the A-Channel, E-Channel, G-Channel and H-Channel groups within the county. With these ITFS channels, Palm Beach provides instructional and educational programming to over 130,000 public school students.

These comments address the proposal in the NPRM to apply competitive bidding procedures to mutually-exclusive ITFS applications. NPRM, ¶¶ 98-100. As the Commission points out, in the Balanced Budget Act of 1997, Congress expanded the authority of the Commission to award radio licenses by auction. NPRM, ¶ 1. In so doing, the Commission provided three explicit exemptions to auction proceedings: (1) public safety station licenses; (2) digital television station licenses; and (3) non-commercial, educational broadcast station licenses as defined

in Section 397(6) of the Act. See 47 U.S.C. § 309(j)(2). The Commission notes that none of these exceptions explicitly covers ITFS licenses. NPRM, ¶ 98.

Mutually-exclusive ITFS applications may arise from new station proposals and applications for major changes to authorized stations. See 47 C.F.R. § 74.911. Accordingly, as a current ITFS licensee and potential future applicant for additional ITFS licenses or modifications to existing stations, Palm Beach has a substantial interest in the outcome of this proceeding.

I. The Commission's Policies Governing ITFS Are Inconsistent with Competitive Bidding for Mutually-Exclusive Applications.

For the past 30 years, the Commission has reserved the ITFS spectrum for instructional use, the only radiofrequencies designated for such services in the United States.¹ The Commission has reiterated throughout this period that the purpose of the ITFS frequency allocation is "to provide for the licensing of transmitting facilities to send visual and accompanying aural instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students."² Because these frequencies have been provided to eligible entities at no charge, ITFS licensees have been able to focus their resources on developing and improving educational opportunities and experiences of students and professionals.

¹ See Educational Television, 39 FCC 846 (1963), recon. denied, 39 FCC 873 (1964).

² Id. at 852-53.

Palm Beach is concerned that the proposal to award ITFS licenses to the "highest bidder" will erode the instructional purpose of ITFS and result in the increased commercialization of the spectrum for several reasons. The need for funds to finance participation in an auction may encourage applicants and licensees to shift part of their focus away from the instructional programming for which the spectrum is allocated. ITFS applicants may enter into agreements to distribute programming which will return a profit in order to support their investment in the spectrum. Alternatively, ITFS applicants may pursue funds from commercial wireless cable lessees at the cost of limiting airtime for instructional use.

Moreover, application of competitive bidding to ITFS licenses appears inconsistent with the policies underlying the ITFS licensing system. In commercial licensing proceedings, such as PCS or LMDS, the service to be provided to the public is likely to be substantially similar regardless of which company acquires the license. Firms, however, place different values on a license depending upon their ability to offer efficient and competitive service and their ability to obtain financing. By awarding licenses to those who value them most highly, a competitive bidding licensing scheme encourages the rapid deployment of new technologies and services and promotes the efficient use of the spectrum.³

³ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 75 RR 1, 8 (1994).

In contrast, the grant of an ITFS license to the "highest bidder" does not simply select the most efficient provider of a service, but rather determines which type of service will be offered and to whom. Unlike commercial companies, each competing ITFS applicant proposes to use the spectrum to offer a unique schedule of instructional programming designed to meet the needs of its students. For example, applicants for ITFS frequencies might include a school district which proposes to use the spectrum to provide formal instruction to enrolled students as well as a national organization which seeks to use the same frequencies to provide instructional programming to students in adult education programs. The award of the ITFS license determines not only which applicant may provide service, but how the spectrum is used. The Commission currently has in place a process for comparative review of mutually-exclusive ITFS applications. See 47 C.F.R. § 74.913. This procedure makes some effort to evaluate the "public interest" associated with the applicants' educational proposals. A system of competitive bidding would make these public interest factors irrelevant although they are clearly an integral feature of the spectrum allocation.

II. The Commission Is Not Required To Auction Mutually-Exclusive ITFS Applications.

In the NPRM, the Commission seeks comment on whether it is required to apply auction rules to mutually-exclusive applications for ITFS stations in light of the recent amendments to Section 309(j) of the Communications Act. As noted

above, there is no express exemption for ITFS stations in the Commission's expanded competitive bidding authority.⁴ See NPRM, ¶¶ 98-101.

Palm Beach submits that the absence of such an exemption does not impose an obligation on the Commission to apply competitive bidding policies to ITFS. Rather, it is well recognized that a statute should not be interpreted to accomplish an absurd or illogical result.⁵ In this case, for the reasons discussed above, awarding ITFS licenses by auction would establish an absurd licensing scheme for non-commercial, educational stations. Moreover, although infrequently applied, courts have recognized that exceptions may be found in statutory provisions where such an interpretation is reasonable and necessary to avoid overturning a sound rule of public policy or to avoid absurd and manifestly unjust consequences.⁶ This proceeding presents the right case for application of these principles. As explained above, application of general auction rules to ITFS stations would erode the essential educational character of ITFS. It would be "absurd" to infer from the

⁴ See 47 U.S.C. § 309(j), as amended by the Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997).

⁵ See National Treasury Employees Union v. United States Merit Sys. Protection Bd., 743 F.2d 895, 914 (D.C. Cir. 1984); Bechtel Constr. v. United Bhd. of Carpenters, 812 F.2d 1220, 1225 (9th Cir. 1987) ("Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious").

⁶ See, e.g., Del Mar v. Caspe, 272 Cal. Rptr. 446 (Cal. App. 6 Dist. 1990); Kempf v. Michigan Bell Tele. Co., 358 N.W.2d 378, 383 (Mich.App. 1984).

omission of a specific statutory exemption an intent by Congress to reverse the long-standing reservation of this spectrum for instructional purposes.⁷

In addition, Palm Beach submits that the Commission should consider the exemptions which Congress did include in the amendments to Section 309(j). Congress expressly provided an exemption for non-commercial educational broadcast stations, as described in 47 U.S.C. § 397(6). See 47 U.S.C. § 309(j)(2). According to the Commission, ITFS does not fall within the section 397(6) exemption because it is not a "broadcast" service. See NPRM, ¶ 99. However, like non-commercial broadcast stations, ITFS licensees use their spectrum to provide non-commercial and non-profit educational programming. In interpreting the statute, the Commission should consider whether Congress' reference to Section 397(6) entities was intended to exclude ITFS stations or whether Congress attempted to include a general exemption for non-commercial educational stations. Certainly, there is nothing in the statute or its legislative history to suggest that Congress expressly decided to abandon its previous judgment that ITFS, like other non-commercial educational services, should be exempt from competitive bidding policies.⁸

⁷ The legislative history of the 1997 Balanced Budget Act suggests that the omission of an auction exemption for a particular service should not necessarily be construed by the Commission as an endorsement by Congress to auction licenses in that service. See H.R. Conf. Rep. No. 105-217 at 572, reprinted in 1997 U.S.C.C.A.N. at 193.

⁸ H.R. Conf. Rep. No. 103-213 at 481-82, reprinted in, 1993 U.S.C.C.A.N. at 1170-71.

Finally, given the lack of clarity in revised Section 309(j), and the concerns regarding ITFS, Palm Beach requests that the Commission seek a clarifying amendment from Congress to exempt ITFS from competitive bidding with language that mirrors the exemption for ITFS stations from application fees in Section 1.1114(e)(4).

CONCLUSION

For the reasons outlined above, Palm Beach believes that the Commission is not required to, and should choose not to, apply competitive bidding to mutually-exclusive ITFS applications.

Respectfully submitted,

SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

By:



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Date: January 26, 1998